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IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Petitioner,

vs.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITIONER'S REPLY BRIEF

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In support of its Petition for Writ of Certiorari (the "Petition"), Petitioner San Paolo U.S. Holding Company, Inc. ("San Paolo"), hereby responds to the Brief in Opposition (the "Opposition Brief") filed by Respondent Lionel Simon, dba Liberty Paper Company ("Simon"), as follows:

INTRODUCTION

In the Petition, San Paolo presents for this Honorable Court's review five sharply focused questions of wide-ranging importance to civil litigants and courts throughout the Nation. In his Opposition Brief, Simon instead focuses on his own inflammatory, revisionist description of the facts of this case in an attempt to divert this Court's attention from these issues of paramount public interest and concern. Simon fails to address or reconcile the admissions of the Court of Appeal and the trial court that they were deferring to the jury in sustaining the punitive damage award to Simon in an amount 340 times greater than the actual damages or harm suffered.

Simon also incorrectly interprets *Cooper Industries, Inc. v. Leatherman Tool Group, Inc. ("Cooper Industries")*, 532 U.S. 424, 121 S.Ct. 1678 (2001), relying primarily on one footnote[1] in an effort to gloss over the significance of the need for this Court to provide guidance as to how the constitutional standard of review should be applied in this and similar cases. Simon further admits that the Court of Appeal employed the deferential "passion and prejudice" standard in affirming the punitive damage award and ignores the issue of whether a defendant's wealth should even be considered when assessing the constitutional propriety of a punitive damage award.

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[1] *Cooper Industries*, 121 S.Ct. at 1688, n. 14.

Simon also ignores the failure of the Court of Appeal to honor the Order of this Court herein, vacating the Court of Appeal's prior decision and ordering it to review this case in light of *Cooper Industries*, i.e., pursuant to the new, heightened independent standard of review. Simon also fails to address the differing methods of applying this new standard among the States. Similar to the error committed by the Court of Appeal below, Simon's interpretation of the facts is one-sided and ignores the facts in favor of San Paolo. This approach is problematic *ab initio*, in that it preordains the same result as that reached by the trial court and reduces the standard of "independent review" to little more than the payment of lip service to San Paolo's constitutional rights. It is this defective approach which is adopted and employed by the Court of Appeal in the Second Opinion.[2]

Contrary to Simon's unsupported argument, appellate courts do "handle the functions of trial courts" when applying an independent review standard to a punitive damage award challenged as constitutionally excessive. Reflecting the same confusion of the Court of Appeal in its decision, Simon argues that San Paolo is essentially trying to upset the factual findings of the trial court. The truth is that San Paolo is challenging the Court of Appeal's repeated deferential review of the record and wholesale adoption of Simon's argument in an effort to affirm the award – instead of independently reviewing the actual (versus implied) factual findings of the jury and applying them to the three factors set forth in *BMW of North America v. Gore ("BMW")*, 517 U.S. 559 (1996), for determining whether San Paolo's constitutional rights have been violated.

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[2] Unless stated otherwise, capitalized words have been defined in the Petition.

ARGUMENT

In his Opposition Brief, Simon fails to address the merits of the significant issues raised in the Petition and instead relies on various boilerplate, conclusory arguments in an effort to detract from these important issues. For example, the fact that the Opinion of the California Court of Appeal is "unpublished" only highlights the urgent need for guidance from this Court as to the correct method for implementing the independent standard of appellate review of the constitutional excessiveness of punitive damage awards set forth in *Cooper Industries*. Beyond the published decisions addressed in the Petition, there are undoubtedly numerous decisions regularly issued by state courts throughout this land on this issue, many continuing to apply an unduly deferential standard of review in a manner rendering the constitutional standard required by *Cooper Industries* meaningless. Moreover, in the prior Petition filed by San Paolo and granted by this Court, the Opinion of the Court of Appeal was similarly unpublished. *San Paolo U.S. Holding Company, Inc. v. Simon*, 532 U.S. 1050, 121 S.Ct. 2190 (Mem) (2001).[3]

Simon acknowledges that the Court of Appeal analyzed the punitive damage award under a "passion and prejudice" standard of review. (See Opposition Brief, p. 19.) In applying this deferential (substantial evidence) standard, however, "[t]he reviewing court *does not act de novo*." *Fortman v. Hemco, Inc.*, 211 Cal.App.3d 241, 259 (1989). (Emphasis added.) Nonetheless, Simon puzzlingly argues that the application of this deferential standard somehow "will, in all cases, result in an independent review for the defendant."

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[3] The underlying decision in *Cooper Industries* was also unpublished. This in no way minimizes the importance of the issues raised by San Paolo.

(Opposition Brief, p. 21.) According to Simon, as long as the Court of Appeal invoked the *BMW* factors in reviewing the punitive damage award, its review must have been de novo.[4] This hypothesis does little more than beg the question: what is required of an appellate court in conducting an independent review of a punitive damage award under *Cooper Industries*?

To justify the Court of Appeal's deferential review of the award against San Paolo, Simon summarily dismisses the issues of federal constitutional concern raised in the Petition, claiming that "[t]his case has an unusual factual and procedural history." (Opposition Brief, p. 1.)[5] Simon, however, fails to even address the authorities discussed by San Paolo which illustrate the problems presented by the divergent, improper application of the independent standard of review by state courts throughout this country when conducting a constitutional inquiry into claims of grossly excessive punitive damage awards. (See Petition, pp. 12-14.)

The Court of Appeal admittedly failed to engage in a de

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[4] Similarly, Simon contends that, under California law, a "trial judge conducts a de novo review of the evidence" when presented with a motion for new trial. (Opposition Brief, p. 13.) Such a motion, however, *may not be granted* in this context "*unless* after weighing the evidence *the court is convinced* from the entire record, including reasonable inferences therefrom, that the court or jury *clearly should have reached a different verdict or decision.*" Cal. Code Civ. Proc., § 657; emphasis added. This standard is patently highly deferential to the verdict, in stark contrast to the independent review required by *Cooper Industries*.

[5] Simon fails to follow up on or otherwise address or support this contention with any facts or legal argument. That is because this is the perfect follow-up case to *Cooper Industries*.

novo review of the record and failed to independently examine each of the *BMW* factors in light thereof, as required by *Cooper Industries*. Simon attempts to avoid this fact by repeatedly arguing that the Court of Appeal *must have* applied the correct standard because it identifies this standard (among others) in the Second Opinion. (See, Opposition Brief, pp. 3, 5.) Instead of applying the independent standard of review pronounced by this Honorable Court, however, the Court of Appeal admittedly again relies upon a deferential presentation of the record identical to that set forth in the Prior Opinion.

Simon ignores that, in the Second Opinion, the Court of Appeal even acknowledges that it applied a substantial evidence standard and deferentially reviewed all of the trial evidence "in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the verdict." (App., A-7.)[6] Simon repeatedly confuses deference to the trial court's factual findings (unless clearly erroneous), which is not disturbed by *Cooper Industries*, with a deferential review of *the entire record in the light most favorable to the award under constitutional attack*, which flies in the face of the de novo standard of review announced in *Cooper Industries*.[7]

As Simon acknowledges, the only factual findings by the jury in this case are the following: (a) there was no binding and enforceable agreement between the parties; (b) San Paolo made a false promise about a material matter to Simon; (c) "the total amount of all damage suffered by Simon and caused

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[6] "App." refers to the Appendix to the Petition.

[7] A jury's "imposition of punitive damages is an expression of its moral condemnation," not a factual determination. *Cooper Industries*, 121 S.Ct. at 1683, 1686.

by Simon's reliance upon San Paolo's promise" was $5,000.00[8]; and (d) San Paolo committed oppression, malice or fraud in connection with the false promise. (App. Vol. III, 613-617.)[9] These are the only facts to which deference must be afforded. Simon, however, refers to an unidentified set of "facts supporting the judgement (sic)" or "verdict" which, he claims, cannot be subjected to independent review on appeal. (Opposition Brief, p. 3.) These "facts" are nothing more than his one-sided presentation of the case (to which the Court of Appeal deferred) and the various "implied" factual findings relied upon by the Court of Appeal to support the award.

The Court of Appeal strained to affirm the punitive damage award based upon its so-called *"implied factual findings* of the jury." (App., A-8.) (Emphasis added.) The court also pronounced its intent to "summarize the evidence

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[8] The first jury refused to award Simon any damages for his alleged loss of profit of $400,000.00 due to his inability to purchase the subject office building.

[9] This is in stark contrast to the "twenty-eight pages of extensive findings" made by the trial court in *Campbell v. State Farm Mut. Auto Ins. Co.*, 432 Utah Adv. Rep. 44, 2001 WL 1246676, *9 (October 19, 2001), *cert. granted*, 122 S.Ct. 2326 (June 3, 2002). In *Campbell* (cited in the Petition at page 14), the jury awarded $2.6 million in compensatory damages and $145 million in punitive damages (a ratio of over 55:1), which the trial court remitted to $1 million and $25 million respectively. The Supreme Court of Utah reinstated the original punitive damage award, noting, *inter alia*, that punitive damage awards "should have a proportional relationship to the defendant's wealth" and that "State Farm is an enormous company with massive wealth," justifying the higher ratio of punitive to actual damages (145:1). *Id.* at *8, 15-16. As reflected above, this Court has granted State Farm's Petition for Writ of Certiorari.

in the *light most supportive of the verdict, for purposes of both constitutional and non-constitutional* issues." (App., A-7-8.) (Emphasis added.) This is a marked departure from *Cooper Industries*, where this Honorable Court clearly required appellate courts across the Nation (and the Court of Appeal in this case in particular) to independently review all of the evidence, not just the facts favorable to the respondent or the unsupported argument of counsel, to determine if a challenged punitive damage award is excessive. Again, it is only the factual findings of the trial court to which deference must be afforded. *Cooper Industries*, 532 U.S. at 440, n. 14.

The Court of Appeal's effort to uphold the punitive damage award based upon implied factual findings and a deferential review of the record does not stand in isolation. Recently, in *Williams v. Philip Morris Inc.*, 48 P.3d 824 (Ore. 2002), the Oregon Court of Appeals upheld a punitive damage award of $79.5 million, 97 *times greater* than the compensatory award of $821,485.80.[10] That court's application of the heightened standard of review established in *Cooper Industries* highlights the need for further guidance from this Court. Like the Court of Appeal herein, the *Williams* Court chose to "state the facts most favorably to plaintiff, drawing all reasonable inferences in her favor." *Id.* at 828. In an effort to reconcile Oregon's deferential "rational juror standard" with the new de novo review standard, the *Williams* Court concluded that, in *Cooper Industries*, this Honorable Court "recognized the jury's primary role in finding the facts relevant to an award of punitive damages . . . and in

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[10] The trial court had previously substantially reduced the punitive award from $79.5 million to $32 million on the grounds that it was excessive under the United States Constitution. *Williams*, 48 P.3d at 828.

establishing the appropriate amount." *Id.* at 837.[11]

Having rationalized the implementation of a de novo review standard which nonetheless defers to the jury, the *Williams* Court reiterated that it would "evaluate the jury's award for excessiveness" based upon a review of the relevant evidence "stating it in the light most favorable to plaintiff." *Id.* at 838. Moreover, the court imputed to the jury various factual findings supportive of the award, repeatedly invoking the term: "the jury could find," "could have found," and "could have believed." *Williams*, 48 P.3d at 839-840, 842. Having applied this patently deferential analysis to the punitive damage award, the court concluded that the trial court erred in reducing it. *Id.* at 842.

Simon fails to address this recurring inability of reviewing courts across the Nation, including the Court of Appeal herein, to properly apply the heightened standard of review set forth in *Cooper Industries*. (Petition, 12-16 & n. 8.) Without strict adherence to this new standard, runaway punitive damage awards will remain unchecked, continuing to increase in size and frequency, impairing "the credibility of the justice system," and adversely affecting "the innovation of new products and . . . the well-being of the economy as a whole. . . .[¶] Junping Han, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 Willamette L. Rev. 477, 492-493 (Summer 2002).

The heightened standard of review called for in *Cooper Industries*, barely one year old, is already being whittled down

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[11] The "rational juror" standard is addressed in the Petition at pages 13-14. The Oregon court directly contradicts this Court's determination that a "jury's award of punitive damages does not constitute a finding of 'fact.'" *Cooper Industries*, 121 S.Ct. at 1686.

via the implementation of a very limited and highly deferential "de novo" standard by reviewing courts. Simon passes over the Court of Appeal's conclusion that, while it "might agree with San Paolo that the award was unusually large," it felt that it was not its task "to discard the judgment of the jury in order to substitute our own"[12] and that it need only "*determine de novo whether the award is so grossly disproportional to the gravity of the wrong as to violate due process.*" (App., A-25; emphasis added.) This *perceived inability to act not only contravenes the mandate of Cooper Industries* and the Order of this Court in this case, but it abruptly deprives San Paolo and others of their constitutional protections against excessive punitive damage awards.

The Opposition Brief is also silent with regard to the role of the defendant's wealth in determining whether a punitive damage award is constitutionally excessive. The Court of Appeal determined that "the punitive damage award was not excessive on its face," since it was "less than five percent of San Paolo's net worth." (App., A-28.) A large punitive damage award, however, "should not be upheld upon judicial review merely because the defendant has the ability to pay it." *BMW of North America v. Gore*, 701 So.2d 507, 514 (Ala. 1997). A large corporation is equally entitled "to fair notice of the demands that the several States impose on the conduct of its business." *BMW*, 517 U.S. at 585. Further, reliance upon a defendant's wealth accumulated outside the jurisdiction unduly burdens interstate commerce. *Id.* "[D]ue process and comity concerns counsel restraint where a proposed award of punitive damages is based to a significant

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[12] This is precisely what the standard set forth in *Cooper Industries* requires the reviewing court to do: independently review the award of punitive damages on a de novo basis. *Cooper Industries*, 121 S.Ct. at 1685-1686.

degree on an accumulation of wealth generated outside the jurisdiction where the wrong was suffered." *Ace v. Aetna Life Ins. Co.*, 40 F.Supp.2d 1125, 1135 (D. Alaska 1999). The award of damages to Simon based upon the entirety of San Paolo's worldwide assets therefore cannot be sustained.

CONCLUSION

For these reasons, Simon's contention that the "asserted error is nothing more than an allegation of 'erroneous factual findings or the misapplication of a properly stated rule of law'" is simply false. (Opposition Brief, p. 5, *quoting* Supreme Court Rule 10.) Instead, as before, the Court of Appeal has decided important questions of federal law that remain unsettled and conflict with "relevant decisions of this Court." Supreme Court Rule 10(c). San Paolo now seeks relief from this Court to minimize the risk of continued confusion and arbitrariness in this area of the law, to restore predictability and reasonableness to this process, and to enforce constitutional limits on awards of punitive damages.

Date: July 31, 2002 Respectfully submitted,

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